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No. 06-610

IN THE

Supreme Court of the United States

JAMAL MOORANI,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONER

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INTRODUCTION

Aliens have a statutory right to both seek voluntary departure and to file one motion to reopen their immigration proceedings. Unless an order granting voluntary departure is tolled or voided, however, any pending motion to reopen is forfeited when a previously-established voluntary departure period expires. This case presents the issue whether a voluntary departure order is tolled or voided by a motion to reopen filed while the voluntary departure period is pending, but decided after it has expired. There is a clear circuit split on the issue. Four circuits (the Third, Eighth, Ninth, and Eleventh), which account for the majority of immigration cases in the United States, hold that the filing of a motion to reopen during a previously-established voluntary departure period tolls that period until the motion to reopen is resolved. Similarly, the Seventh Circuit has ruled that, where such a motion to reopen is *granted* by the Board of Immigration Appeals ("BIA"), the underlying departure order is rendered void—a standard under which Petitioner would have prevailed here. In contrast, the Fifth Circuit and the Fourth Circuit, which together account for a substantial percentage of immigration cases in the United States, take a no-tolling position and hold that such a motion to reopen is always forfeited when the voluntary departure period expires.

The Government, without contesting either the split that exists as to tolling or the importance of the issue presented, nonetheless argues that this Court's review is not warranted. It first contends that the split may become less robust because it speculates that it is "possibl[e]" that the Fifth Circuit's position may change if this Court vacates the now-moot decision in *Banda-Ortiz v. Alberto R. Gonzales, United States Attorney General*, 445 F.3d 387 (5th Cir. 2006), Opp. 18, where there is a pending certiorari petition.[1] The Government also maintains that non-judicial resolution of the issue presented may occur through new Justice Department regulations or new legislation. Opp. 19-20.

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[1] This Reply cross-references *Banda-Ortiz* Petition for Certiorari, filed Sept. 28, 2006 (hereinafter "*Banda-Ortiz* Pet."). Moorani's current counsel of record is the same as Banda-Ortiz's counsel.

The Government's position is unrealistic and suggests no serious basis for denying review. Even assuming that *Banda-Ortiz* will be vacated, there is no reasonable basis for believing that the law in the Fifth Circuit will change. The Fifth Circuit's position on the issue presented is clear—in *Banda-Ortiz*, a panel published its no-tolling opinion over Judge Smith's dissent; the court then received full briefing on Banda-Ortiz's petition for rehearing *en banc* and carefully considered it with five judges joining a dissent from denial of rehearing *en banc*. *Banda-Ortiz* Pet. App. 6a-7a. The prospect of a non-judicial resolution is even more far-fetched. There is no realistic possibility that the Justice Department will write regulations reversing a no tolling position the Department has consistently advocated to lower courts and repeats again in the Opposition here. As to a possible Congressional fix, the Government itself recently represented to the Court that immigration legislation is unlikely to pass in the near future. This Court should therefore immediately resolve the split presented in this case, which now involves seven circuits and the majority of immigration cases in the United States.

I. THERE IS A WELL-ESTABLISHED SPLIT ON THE ISSUE WHETHER A MOTION TO REOPEN THAT IS NOT RESOLVED DURING A VOLUNTARY DEPARTURE PERIOD IS FORFEITED

The courts of appeals have staked out conflicting positions on whether a pending motion to reopen is forfeited if it is not decided before a previously-established voluntary departure period expires. As set forth in the Petition (20-22), the Third, Eighth, Ninth, and Eleventh Circuits have taken a "no forfeiture" approach and hold that if a motion to reopen was timely filed (before the voluntary departure period expired), the voluntary departure period is tolled pending resolution of that motion. *See Kanivets v. Gonzales*, 424 F.3d 330, 336 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005); *Ugokwe v. United States Attorney General*, 453 F.3d 1325, 1331 (11th Cir. 2006).

The Fifth and Fourth Circuits have taken the opposite view and hold that an alien always forfeits a pending motion to reopen when the voluntary departure period expires. *See Banda-Ortiz* Pet. App. 8a; *Dekoladenu v. Gonzales*, 459 F.3d 500, 504 (4th Cir. 2006). The Government admits that there is a split between the Fifth and

the Fourth Circuits on the one hand, and the Third, Eighth, Ninth, and Eleventh Circuits on the other hand. Opp. 17-18.

The Seventh Circuit has held, in *Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005), that where the BIA *granted* a motion to reopen that had been filed before, but decided after, a previously-established voluntary departure period had expired, the grant of the motion to reopen necessarily vacated the underlying voluntary departure order. Moorani would prevail under this standard because the BIA initially granted his motion to reopen (although the Immigration Judge ("IJ") on remand held that his failure to depart during the voluntary departure period precluded adjusting his status). The Seventh Circuit did not reach the question of whether *filing* a motion to reopen voided the voluntary departure period since it ruled that *granting* the motion did so. There is also confusion and inconsistency in the lower courts on the effect of *granting* a motion to reopen.[2]

Accordingly, the conflict on this issue is well-developed and nothing would be gained from further percolation in the lower courts. The Government's efforts to avoid review would only unnecessarily prolong uncertainty and disuniformity on this issue throughout the country.

The Government nonetheless argues that the split may be somewhat reduced, although not eliminated, because it speculates that the Fifth Circuit's position may change in the future. Specifically, the Government unconvincingly suggests that if the Fifth Circuit's *Banda-Ortiz* decision were vacated as moot, as the Government recently requested in its Opposition, there is a "possibility that the Fifth Circuit ultimately could adopt a view

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[2] In *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002), the Ninth Circuit ruled that the "BIA's granting of a motion to reopen means that there is no longer a final" voluntary departure order "to review" for the court of appeals. In contrast, two circuits have held that a motion to reopen *filed and granted* after the voluntary departure period had expired does not void the underlying voluntary departure order. *See* Opp. 11 n.4; *see also Singh v. Gonzales*, 468 F.3d 135, 139-140 (2d Cir. 2006); *Dacosta v. Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006). Although the Second Circuit expressly disagreed with the Seventh Circuit's *Orichitch* decision, *Singh*, 468 F.3d at 139, that case, and the First Circuit case, are technically distinguishable from *Orichitch* because the motion to reopen was filed *after* expiration of the voluntary departure period.

different" from that in *Banda-Ortiz* and, thus, this Court should not review the "unpublished opinion" issued in this case. Opp. 18. This reasoning is doubly flawed. First, even apart from the Fifth Circuit's decisions, there is still a clear split among the circuits on the issue presented. In *Dekoladenu*, the Fourth Circuit considered and explicitly rejected the approach of circuits allowing tolling. In any event, the Fifth Circuit's position is clear and there is no reasonable prospect that it could change. As a technical matter, *Banda-Ortiz* is the law of the Fifth Circuit and whether this Court will exercise its discretion to vacate that opinion in the future is not free from doubt. *See Banda-Ortiz* Reply 2. More to the point, as a practical matter, it could not be clearer that the rule set forth in *Banda-Ortiz* will continue to govern in that circuit. In *Banda-Ortiz*, the panel issued a published opinion over Judge Smith's vigorous dissent. *Banda-Ortiz* Pet. App. 8a-26a. Then, the court received full briefing on Banda-Ortiz's petition for rehearing *en banc*, and carefully examined it with five judges dissenting from the denial of rehearing *en banc*. *Id.* 6a-7a. Thus, this issue has been fully and finally ventilated in the Fifth Circuit. Indeed, the Fifth Circuit has already repeatedly confronted this issue and has not deviated from or questioned its holding in *Banda-Ortiz*.[3]

It needlessly delays matters for this Court to wait for the Fifth Circuit to "re-adopt" its fully considered position in another published case.[4] As of now, the vast majority of immigration cases are subject to the split, *see Banda-Ortiz* Pet. 13-14, and the issue presented here is not going to disappear. Indeed, the split is widening: In addition to the seven circuits to have considered the

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[3] *See, e.g.*, *Abbas v. Gonzales*, No. 06-60196, 2006 WL 3539165 (5th Cir. Dec. 7, 2006); *Moti v. Gonzales*, No. 05-61095, 2006 WL 3794345 (5th Cir. Dec. 19, 2006).

[4] The Government intimates that the Fourth Circuit's decision in *Dekoladenu* may be a better vehicle for this Court's review. Opp. 22 n.7. But given the Government's efforts to avoid the Court's consideration of this issue on other grounds, the substantial percentage of immigration cases that arise in the Fifth Circuit, and the immediacy and importance of the issue presented, this case is an excellent vehicle for this Court's review. It is also rank speculation whether *Dekoladenu* would be a suitable vehicle from a case-specific perspective, if certiorari were sought.

issue, there are others that will face it soon.[5] Further delay will only exacerbate the confusion throughout the country regarding the statutory rights of aliens.

II. THE ISSUE IS OF GREAT NATIONAL IMPORTANCE AND REQUIRES THIS COURT'S IMMEDIATE RESOLUTION

This Court has made clear that the immigration laws governing access into the country as a whole should be uniformly interpreted and administered. *Zadvydas v. Davis*, 533 U.S. 678, 700-01 (2001); *see also Banda-Ortiz* Pet. 11-12. This issue affects a significant number of aliens, all of whom should enjoy the same rights under the federal statutory scheme. This split is particularly troublesome because the Fifth and the Ninth Circuits have heavy immigration dockets and handle a large percentage of immigration cases in the country. *Banda-Ortiz* Pet. App. 7a. Moreover, the disagreement between those two circuits will lead, as Ninth Circuit Judge Carlos Bea has noted, to "forum shopping." *Hearing Before the United States Senate Judiciary Comm. on the Judicial Review of Immigration Matters*, 109th Cong. 7-9 (2006); *see also Banda-Ortiz* Pet. 14-17.

Nevertheless, the Government advises the Court that the issue may be resolved through the possible adoption of Department of Justice regulations or congressional legislation. Opp. 19-20. The Government's position on such non-judicial resolution is extremely unrealistic and, indeed, flatly contradicts its own prior representation to this Court.

First, there is no reasonable possibility that any future Justice Department regulations will alter the Department's oft-stated position on the tolling question presented here, and the Solicitor General does not suggest otherwise. In the lower courts and in the

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[5] *See, e.g., Martinez-Espino v. Gonzales*, Nos. 05-4076, 05-4453, 2006 WL 3690308, at *2 (6th Cir. Dec. 14, 2006) (noting that the Ninth Circuit's analysis in *Azarte* is "reasonable," but "leav[ing] to . . . a more appropriate case" to determine whether to "adopt *Azarte*"); *Naeem v. Gonzales*, 469 F.3d 33, 37 (1st Cir. 2006) (finding unnecessary, on the facts of the case, to decide the whether a motion to reopen tolls the voluntary departure period, but noting that "[e]ven the *granting* of a motion to reopen cannot expunge an alien's previous violation of an order to depart") (emphasis in original, internal quotation marks omitted).

Opposition here, the Justice Department has vigorously argued that the Act does *not* authorize tolling the voluntary departure period to resolve a motion to reopen because the "more specific voluntary departure provision governs." Opp. 14. There is no reason to believe, and the Solicitor General offers none, that the Justice Department, in writing regulations to generally govern aliens' voluntary departure, will alter the fully developed legal position it has consistently taken in litigation with respect to specific aliens. Thus, any Justice Department regulations in the near future plainly will not resolve the tolling issue that divides the lower courts.

Moreover, it is quite uncertain whether the Department will adopt any regulations, whatever their content, in the near future. The Government has not provided *any* deadline or timeframe for the adoption of the contemplated regulations. Such regulations have been pending for a decade. In 1997, the Department of Justice promulgated an "interim" rule that set forth three possible approaches to the issue presented. But there has been no further action taken or permanent regulations proposed in that time. *See Banda-Ortiz* Pet. 27-28. Given this history, it seems unlikely that a final rule will be adopted any time soon.

Second, the prospect of a legislative solution, which would, in any event, have only prospective effects (Opp. 23), is also remote. The Government recently represented to the Court in *Gonzales v. Duenas-Alvarez*, No. 05-1629, *cert. granted*, Sept. 26, 2006; *decided*, 127 S. Ct. 815 (2007), that immigration reform legislation is *unlikely* to be enacted in the near future and should *not* be viewed as a vehicle obstacle to a grant of certiorari. *Duenas-Alvarez* Pet. 22 ("[n]o conference committee has yet been appointed to reconcile the two bills, which differ in certain significant respects. . . . At this point . . . it is uncertain whether [the legislation will] pass"). Thus, even when the Republican party controlled the Presidency and Congress, the proposed immigration legislation was unlikely to pass. *See also Banda-Ortiz* Pet. 15-16. It now seems that, with Congress and the Presidency under the control of different parties and a Presidential election approaching, there is even less of a chance of comprehensive immigration reform. *See, e.g.*, Christina Bellantoni, *Senate GOP Ready To Fight For Agenda*, WASH. TIMES, Feb. 19, 2007, at A4 ("immigration reform" is at "the

bottom of the Republican agenda").

Moreover, the Government's representation in *Duenas-Alvarez* concerned legislation that had *passed both* Houses and awaited only conference committee reconciliation. Here, as the Solicitor General concedes, "comprehensive immigration reform bills *have not yet been introduced* in *either* the House or the Senate in this Congress," so the Government can only feebly offer that it is somehow "*anticipated* that such bills will be taken up by Congress during the current Session." Opp. 20 (emphases added). Effectively, the Government urges this Court not to resolve a clear, deep split affecting a substantial number of aliens because of its fanciful hope that legislation that has not been introduced might possibly be considered by Congress and might possibly resolve the issue here.

III. THE GOVERNMENT IS WRONG ON THE MERITS

The Government's defense of the forfeiture or "no-tolling" rule adopted by the Fourth and Fifth Circuits is unpersuasive.

It has long been established that it is a court's duty "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotations omitted); *Banda-Ortiz* Pet. 18-19. The relevant statutory language makes plain that aliens have the right *both* to seek voluntary departure *and* to seek reopening of their immigration proceedings. On the one hand, "[t]he Attorney General may permit an alien voluntarily to depart the United States" within a period up to "60 days." 8 U.S.C. §§ 1229c(a)(1); (b)(2).[6] On the other hand, "[a]n alien may file one motion to reopen proceedings" "within 90 days of the final administrative order of removal." 8 U.S.C. §§ 1229a(c)(7)(A); (c)(7)(C)(i). The BIA regulations state that if an alien leaves the country within the period allowed for voluntary departure, he forfeits any pending motion to reopen. *See* 8 C.F.R. § 1003.2(d).

The only plausible way to reconcile these provisions to preserve *both* statutory rights is to require tolling of any applicable

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[6] Failure to leave the country within the time allowed for voluntary departure renders an alien ineligible for ten years for cancellation of removal. *Id.* § 1229c(d); *see also* 8 C.F.R. § 1240.26(a).

voluntary departure period while an alien's motion to reopen proceedings is pending. A tolling rule "would effectuate both statutory provisions. IJs and the BIA could still grant voluntary-departure periods of up to 60 days only, but then, if that period were tolled, they would retain the authority Congress intended: to determine one non-frivolous motion to reopen." *Azarte*, 394 F.3d at 1288; *see also Banda-Ortiz* Pet. App. 19a. The contrary rule adopted below, in contrast, effectively nullifies the right to seek reopening. "[A]n alien who does *not* leave the United States within his voluntary departure period is not eligible for an adjustment of status, but an alien who *does* leave the country within his voluntary departure period forfeits any pending motion to reconsider or reopen which the BIA has not yet decided." *Barroso v. Gonzales*, 429 F.3d 1195, 1201 (9th Cir. 2005) (emphasis in original). As a result, "[e]ither way, stay or go," under the Government's position, aliens would be "precluded from obtaining a ruling on the merits of their properly filed, timely motion to reopen." *Azarte*, 394 F.3d at 1282; *Ugokwe*, 453 F.3d at 1331 (same).

Contrary to the Government's position (Opp. 15-16), tolling does not undermine the statutory "limits on the length" of a voluntary departure period because, unless explicitly provided otherwise, limitation periods are subject to tolling. "It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (internal citations and quotation marks omitted); *see also Banda-Ortiz* Pet. App. 22a (Smith, J., dissenting) (same). Thus, "suspension of a voluntary departure period merely tolls the running of that period; it does not extend it." *Barroso*, 429 F.3d at 1206 (internal quotation marks omitted); *see also Banda-Ortiz* Pet. 21-22.

Since there is no necessary conflict between these two provisions, the canon that a more specific provision controls a more general one when there is such "irreconcilable conflict," is inapplicable here. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *see generally Banda-Ortiz* Pet. 22-26. The voluntary departure provision simply establishes a procedure for effectuating the alien's departure when that has been finally ordered. The

provision on motions to reopen before the BIA sets forth procedures for *continuing litigation* over an alien's immigration status, and has nothing to do with departure. Thus, these provisions address distinct subject matters and different stages of an alien's immigration proceedings. As discussed, these provisions can also be reconciled by allowing tolling. So it is only the BIA regulation precluding tolling, not the statute, which needlessly creates a "conflict." Therefore, the canons for reconciling conflicting statutory provision have no application.

In any event, the voluntary departure provision is not more "specific" than the motion to reopen provision simply because it affects a subset of aliens. Rather, as noted, the provisions simply do not govern the same conduct. The one narrow and discrete point of intersection addresses only the *effect* of an action under one provision (voluntary departure) on the action taken pursuant to a different provision (motion to reopen). Thus, these provisions are wholly unlike those in *Morton*, where both statutes governed precisely the same conduct—preferential race hiring by the government, but did so at different levels of generality.[7] *Morton*, 417 U.S. at 550-51. Here there is no such overlap.

Even if there were a conflict between the two provisions, the canon of statutory construction requiring that ambiguities in immigration statutes be resolved in favor of an alien calls for tolling. This Court has repeatedly endorsed this canon "because deportation is a drastic measure and at times the equivalent of . . . exile," and "we will not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (internal citation omitted); *see also, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *Banda-Ortiz* Pet. 20-21. Here, the narrowest and most favorable reading of the statutory language is to permit aliens to meaningfully exercise their statutory rights both to seek voluntary departure *and* to seek reopening of their immigration proceedings. A contrary rule

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[7] Nor are the provisions analogous to those in other cases cited by the Fourth Circuit. *See Banda-Ortiz* Pet. 24-25 & n.3 (discussing cases). In each case, the more "specific" provisions plainly covered subject matter that was a subset of the subject matter covered by the more general provision.

would prevent "aliens from receiving decisions on their motions to reopen [and] would eliminate" in cases such as this "all possibility of redress if their circumstances changed." *Azarte*, 394 F.3d at 1289. This severely limits an alien's freedom and exercise of the statutorily-granted right to voluntary departure since the BIA will rarely act on a motion to reopen within the statutory maxium of 60 days for departure, 8 U.S.C. § 1229c(b)(2). *See* Pet. 23 (emphasizing that the proceedings on motions to reopen take months, and noting that it took the BIA five months to consider and grant Moorani's timely motion to reopen; that it took six months for the BIA to act on a motion in *Azarte* and eight months in *Kanivets*). The statute should therefore not be construed, under *Tan* and its progeny, to confront aliens with a Hobson's choice between sacrificing either their right to seek reopening or their right to seek voluntary departure.[8] The tolling interpretation which preserves both of the alien's rights is at least as plausible, and therefore must be adopted.

CONCLUSION

The petition should be granted.

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[8] Similarly, in *Stone v. INS*, 514 U.S. 386, 388-89 (1995) (Opp. 17), the Court noted that Congress would not want aliens to face a "Hobson's choice: petition for agency reconsideration at the risk of immediate deportation, or forgo reconsideration and petition for review to obtain the automatic stay."

In any event, the Government's reliance on *Stone* to reject tolling is erroneous because *Stone* is a finality, not a tolling, decision, where the Court's concern was with the implications of the finality of voluntary departure orders for judicial review. *Id.* at 390 ("The parties disagree . . . regarding the effect that petitioner's later filing of a timely motion to reconsider had on the *finality* of [voluntary departure] order.") (emphasis added); *id.* at 405 ("The consolidation provision in § 106(a)(6) reflects Congress' understanding that a deportation order is final and reviewable when issued."). The issue here is not whether the voluntary departure order is final, but rather whether tolling gives effect to all of the governing statutory provisions.

Respectfully submitted,

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